

In re ) Fair Hearing No. T-06/08-247  
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 Appeal of )

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating a report that she emotionally abused her mother, who resides in a nursing home. The issue is whether the petitioner's actions meet the statutory definitions of emotional abuse.

1. The petitioner's mother, who is in her late nineties, was admitted to the nursing home where she now resides in April 2004 following a severe stroke that left her severely physically and mentally impaired. She is non-ambulatory and unable to speak. The nursing home staff reports that she is able to communicate "yes" or "no" both verbally and through other vocalizations and gestures.

2. The petitioner is her mother's legal guardian.

There appears to be no dispute that the petitioner's relationship with the nursing home has been strained over

ongoing disagreements as to what constitutes appropriate care and treatment for the petitioner's mother.

3. At the hearing in this matter held on October 3, 2008, the Director of Social Services at the nursing home testified that she has met with the petitioner on a quarterly basis to discuss her mother's condition and care. The Director stated that she met with the petitioner and other nursing home staff in the summer of 2007, at which time the nursing home staff expressed its concern that the petitioner was acting against her mother's wishes when she visited her at the home.

4. On July 15 and 17, 2007 the nursing home staff, several of whom testified at the hearing, observed that the petitioner insisted on getting her mother out of bed and into a wheelchair to visit with her in the dining room even though her mother was screaming and otherwise indicating that she did not wish to do so. The staff reported that the petitioner yelled at her mother to get out of bed, and threatened her that she would not visit if she failed to do so.

5. On one of those days, the Social Services Director was summoned by the staff and confronted the petitioner in the dining room. The petitioner insisted that it was the

home's responsibility to get her mother out of bed whenever she visited. Believing that the petitioner's actions were distressing to her mother, the Director reported the incident to the Department's Adult Protective Services Division (APS).

6. The Department's APS investigator testified that after he received the above report he met with the petitioner, the nursing home staff, other family members, and the nursing home ombudsman to attempt to "reach an accommodation". He testified that the petitioner insisted she was not at fault and that she knew best what her mother would have wanted.

7. Following the meeting the investigator determined that the petitioner's actions had caused her mother emotional distress, and he recommended that the incidents be substantiated as emotional abuse. Following a Commissioner's Hearing on April 4, 2008, the Department notified the petitioner on May 6, 2008 that it had upheld the investigator's recommendation. This appeal followed.<sup>1</sup>

8. At the hearing the petitioner and two of her siblings denied that the petitioner had yelled at her mother. They all insisted, however, that the petitioner knew best

what their mother wanted, and that the nursing home was remiss in not getting their mother "ready" whenever they visited.

9. Based on the testimony of the petitioner and her witnesses, it is clear that they truly believe their mother would want to get out of bed and dressed whenever they visit. It is also clear, however, that they are basing their judgment on what they believe their mother would have wanted *before* she had her stroke. The petitioner and her sisters seem unable to understand and appreciate the affects of brain injury and dementia. They also seem unable to accept that their mother, *because of her present condition*, may not always wish to get out of bed to visit with them whenever they come to the nursing home. Indeed, it does not appear that they even acknowledge the legitimacy and significance of their mother's wishes and protestations in this regard.

10. The above notwithstanding, the Department presented no evidence of any incident of alleged abuse by the petitioner that occurred after July 15 and 17, 2007. As

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<sup>1</sup> Following the petitioner's timely appeal to the Board the matter was continued several weeks for the petitioner to attempt to obtain an attorney.

noted above, when those incidents were reported to the Department, the APS investigator chose to meet with the affected parties to try to reach an "accommodation". It was only *after* that meeting had failed to resolve the matter that he determined that the petitioner's actions had constituted abuse. It is clear from his testimony that if the petitioner had been contrite at that meeting, he would not have substantiated the report as abuse.

ORDER

The Department's decision substantiating emotional abuse is reversed.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d).

The statute identified by the Department in its substantiation of "emotional abuse" provides as follows:

(1) "Abuse" means:

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation or other forms of serious emotional distress.

33 V.S.A. § 6902

As noted above, there is no evidence that the petitioner subjected her mother to emotional distress after she met with the Department's investigator following the reports from July 15 and 17, 2007. As for those reports, themselves, it is clear from the testimony of the Department's investigator that he would not have substantiated those reports as abuse if the petitioner had agreed to "accommodate" her behavior after his meeting with her. Indeed, based on the evidence presented, the only offense by the petitioner that can be found to have occurred after her meeting with the APS investigator is her continuing lack of contrition and insight. It cannot be found, however, that this alone has caused any distress to her mother.

Until her meeting with the APS investigator, the petitioner may well have had a compelling basis to claim that

she did not know her actions were causing distress to her mother and, hence, were not "intentional" as defined by the above statute. However, now that she is aware that the Department views her actions as emotional abuse, she can no longer claim ignorance or expect that others (including the Human Services Board) will accept her view as to what is in her mother's best interest.

At this time, however, based on the evidence presented, it cannot be concluded that the petitioner intentionally subjected her mother to emotional distress as defined by the above provisions. Therefore, the Department's decision is reversed.

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